Supreme Court, U.S.
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No. 03-1079

IN THE SUPREME COURT OF THE UNITED STATES

PATRICIA L. CARUSO,
Director, Michigan Department of Corrections,

Petitioner

vs.

KEVIN MARK ABELA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

RESPONDENT'S ANSWER TO
PETITION FOR WRIT OF CERTIORARI

LIMITED APPEARANCE OF COUNSEL

CERTIFICATE OF SERVICE

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RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

Respondent Kevin Abela, by and through his attorney James S. Lawrence, hereby moves to proceed in forma pauperis, and says:

1. Respondent Kevin Abela was a Habeas Corpus petitioner. He retained attorney James S. Lawrence to represent him in state court motions, and in the United States District Court and the Sixth Circuit Court of Appeals. The fees were actually paid by a relative of Respondent.

2. During the pendency of this matter in the Sixth Circuit Court of Appeals, Kevin Abela discharged from parole, and moved to the country from which his ancestors came, Malta, a country consisting of a small group of islands in the Mediterranean Sea, considered to be part of Europe.

3. Counsel has had contact with Mr. Abela by phone and letter. Counsel advised Mr. Abela of the fees and costs involved in defending against the Petitioner warden's Petition for Writ of Certiorari. Mr. Abela indicated that he would like to have present counsel represent him in the United States Supreme Court, but he cannot afford the fees and costs.

4. It was the intention of present counsel not to file a response to the Petition for Writ of Certiorari because not retained, however, he received a request from this Court requesting (but not ordering) that he prepare a response.

5. There is some burden upon counsel in doing the work for free. There would be much greater burden on counsel in also paying printing costs and other possible costs (such as traveling to Washington, D.C. for oral argument) if he is not to be paid at all. Counsel operates a one-attorney law office and is not wealthy. By filing on 8 1/2 " by 11" paper, instead of the special booklets otherwise required by court rule, counsel can fulfill this Court's request for an Answer, without undergoing undue hardship.

6. It is counsel's understanding that Respondent Abela has written to the United States Supreme Court asserting his indigence and requesting that present counsel be appointed as his attorney for the United States Supreme Court.

7. Counsel does not presently have an affidavit of indigence signed by Mr. Abela, but only his verbal representations of indigence. Counsel recognizes that Supreme Court Rule 39 requires such an affidavit. Respondent submits that under the unique circumstances of this case, this Court should permit him to appear in forma pauperis, so that counsel may comply with the Supreme Court's request to file an Answer, without placing undue financial burden upon counsel.

8. Counsel has forwarded to Mr. Abela in Malta a proposed affidavit of indigence. If and when Mr. Abela returns it, counsel will promptly file it with the United States Supreme Court.

WHEREFORE, Respondent Kevin Abela moves for leave to proceed in forma pauperis.

Respectfully submitted,

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Detroit, MI 48226
(313) 965-4189

Dated: 4-19-04

QUESTIONS PRESENTED

Respondent Kevin Abela was convicted of manslaughter and carrying a concealed weapon, in a trial based in part on Respondent's statements made during questioning by police while he was severely injured, ill, and recovering from surgery. Petitioner Patricia Caruso, director of the Michigan Department of Corrections, seeks certiorari from a ruling of the Sixth Circuit Court of Appeals that held Respondent Abela's Habeas Corpus petition was timely filed. The question presented by Petitioner's petition is:

QUESTION 1: DOES THE TOLLING PERIOD OF 28 U.S.C. § 2244(d)(2) FOR A "STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW" APPLY TO THE TIME WHEN A PETITION FOR WRIT OF CERTIORARI IS PENDING AFTER STATE COURT DENIAL OF SUCH REVIEW.

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RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI

KEVIN ABELA, Respondent, by and through his attorney, James S. Lawrence, hereby opposes the Respondent's Petition for Writ of Certiorari.

OPINIONS BELOW

These are stated and enclosed in Petitioner's petition. However, Petitioner mischaracterizes the Michigan Supreme Court ruling of May 28, 1998 (PWC, 1), by calling it a finding that issues were barred from consideration by procedural default. The Michigan Supreme Court made no such ruling.

The Michigan Supreme Court denied leave to appeal on the ground that Respondent had not made the showings required by court rule M.C.R. 6.508(D). This is not a ruling of procedural default. As the Michigan Supreme Court made clear in *People v. Jackson*, 465 Mich. 390 (2001), M.C.R. 6.508(D) applies a rule of "cause and prejudice" to collateral review motions, and a citation to M.C.R. 6.508(D) could be a showing of lack of "cause" for not filing earlier, or could be a showing of lack of "prejudice." Specifically, they found that because the issue lacked merit, it was denied under M.C.R. 6.508(D):

> "Pursuant to M.C.R. 6.508(D), "[t]he defendant has the burden of establishing entitlement to the relief requested." The circuit judge's second opinion discussed the merits of the juvenile court waiver issue and found it to be without merit. Accordingly, the defendant failed to establish his entitlement to relief. Thus, the defendant has not been deprived of review of that issue by the operation of subrule (D)(3)."

In this case, the trial court considered the merits of the issues and made no finding of procedural default. The Michigan Supreme Court never

overturned the action of the trial court, and that trial court action is therefore law of the case. Under Michigan law, a point decided by a lower court in favor of the appellant is not before the reviewing court unless the appellee files a cross-appeal. *Malcolm v. City of East Detroit*, 437 Mich. 132, 148 (1991); *Bruce Township v. Gout*, 207 Mich. App. 554 (1995).

There is therefore no ruling of any Michigan court finding that Respondent Abela committed procedural default or was subject to barring of issues because of procedural default.

STATEMENT OF JURISDICTION

Respondent agrees that the United States Supreme Court has jurisdiction under 28 U.S.C. § 1254(1), however, Respondent notes that Petitioner is seeking interlocutory review. The underlying matter was remanded by the en banc court to the panel for a decision on the merits. That is being argued April 21, 2004 at the Sixth Circuit in Cincinnati.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has correctly identified the main statutory provision involved, 28 U.S.C. § 2244(d).

Another statutory provision of importance is 28 U.S.C. § 2263(b)(2), the timing provision for death penalty cases:

"(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled -

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if -

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254;

and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section."

STATEMENT OF THE CASE

PROCEDURAL FACTS

Respondent Kevin Abela (Petitioner in the United States District Court)was convicted of manslaughter and CCW in the Oakland County, Michigan, Circuit Court, upon his trial for second degree murder and CCW

in the death of Stanley Underwood. Case No. 90-101083-FC. He was found not guilty of assaultive crimes where it was charged he assaulted prosecution witnesses Dan McAllister, Jerry Sullivan, and Jacob Sullivan. Trial and sentencing took place in Oakland County Circuit Court before the Hon. John N. O'Brien. On July 29, 1991, Respondent was sentenced to prison for 7 to 15 years for manslaughter and a concurrent 3 years 4 months to 5 years for CCW.

An appeal of right raising different issues was denied by the Court of Appeals on July 22, 1994, Case No. 144005. The Michigan Supreme Court denied leave to appeal March 31, 1995, Case No. 100783. The Motion for Relief from Judgment was filed April 14, 1996. On August 20, 1996, successor Judge John J. McDonald issued an order directing the prosecutor to file an answer, which they did. On October 22, 1996, Judge McDonald issued a one page order denying the motion, not for any procedural shortcoming, but for lack of merit. The Court of Appeals denied leave to appeal on July 22, 1997, Case No. 200930. The Michigan Supreme Court denied leave to appeal on May 28, 1998, Case No. 110260. The United States Supreme Court denied a Petition for Writ of Certiorari on October 19, 1998, Case No. 98-327.

On December 13, 1999, the United States District Court, Eastern District of Michigan, Southern Division, denied Respondent's Motion to

Dismiss, holding that the Petition for Habeas Corpus was not barred by the statute of limitations set forth in 28 U.S.C. § 2244.

On October 31, 2000, the District Court denied the Petition for Habeas Corpus. On December 28, 2000, the District Court denied Respondent Abela's Motion for Certificate of Appealability.

On April 20, 2001, the Sixth Circuit issued its Order granting Respondent's Motion for Certificate of Appealability. A ruling by a 3 judge panel was issued October 30, 2002, affirming the District Court on a different basis, that the Petition for Habeas Corpus was untimely filed. By order of January 21, 2003, the Sixth Circuit granted Rehearing En Banc. By published en banc decision of the Sixth Circuit, *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003), the Court found the Petition for Habeas Corpus was timely filed, and remanded to the panel for consideration of the underlying issues. Oral argument before the Sixth Circuit panel is scheduled for April 21, 2004.

FACTS REGARDING THE TRIAL

There was a party at the house of Al Howard on the evening of May 18 and early morning of May 19, 1990. (T June 11, 118). There were three fights, the last of which resulted in the death of Stanley Underwood. Respondent claimed self-defense.

There was an incident outside (the first fight) where Jacob (JJ) Sullivan and Respondent Abela had a fight, and JJ got a black eye. (T June 13, 199-201; T June 20, 81-86). JJ testified he did not know why Respondent suddenly attacked him. (T June 13, 42, 48). James Dakroub testified he observed arguing between JJ and Respondent regarding pushing of a car, and the next thing he knew they were in the street fighting. (T June 13, 199-201). Respondent testified he criticized JJ for trying to push a car where it would hit another car, that JJ threatened him, then shoved him, put him in a headlock, took him to the ground, and Respondent fought back. (T June 20, 81-86). He then looked for his glasses, which were broken. (T June 20, 86, 92).

JJ ran in the house to complain. (T June 11, 187, 236; T June 13, 95). His brother Jerry Sullivan, on learning of the first fight, ran out of the house, accompanied by others, and attacked Respondent Abela (the second fight). (T June 11, 121-126, 188-190, 215; T June 13, 12, 98, 226, 268; T June 18, 64, 252-266; T June 20, 86-96).

Respondent and Ron Wright left the party, but Ron Wright wanted to go back and get his coat which JJ Sullivan had. Respondent Abela waited at a driveway down the street from the party, with a broken nose, and broken glasses. Suddenly several people who looked like blurs to him, because he was not wearing his glasses broken in the earlier fight, ran at

him, attacked him, and had him on the ground. Stanley Underwood was on top of Respondent. (T June 18, 45, 273). Respondent was flattened to the ground by "all these people." He did not know who was on top of him, but he stabbed because he was seriously injured and afraid of greater injuries. Respondent drew his knife, which he used at work, from a sheath on his belt. Respondent stabbed upwards, resulting in the death of Underwood. Respondent fled the scene, and turned himself in. (T June 11, 270-277; T June 18, 41-45, 66, 200, 252-253, 266-267: T June 20, 11, 99-110).

Police officers testified that they took Respondent to the hospital, that he had broken bones in his face, and was treated in the emergency room. (T June 18, 202, 232). They found Respondent's broken eyeglasses with blood on them. (T June 18, 79).

Prosecution witness Dan McAllister told police that when he got to the (third) fight it was already going on, and "everyone was piling on" Respondent Abela. (T June 18, 294-296). McAllister testified in court that he saw the whole third fight, and no one was piling on. (T June 18, 116-124). He broke his foot in the incident, but did not know whether he kicked Respondent in the face. (T June 18, 130, 147). Jerry Sullivan admitted kicking Respondent "several times" in the face during the third fight. (T June 13, 114, 191). Al Howard, host of the party, said Jerry was not among those present during the third fight, as did Marty Semble. (T

June 11, 143; T June 18, 41-44). Marty Semble, who did not know Respondent or his companion Ron Wright (T June 18, 33) testified that the soon-to-be deceased, Stan Underwood, was on top of Respondent hitting him. (T June 18, 44-45, 64).

Deputy Gary Murray testified that when he got to the party, people were trying to hide beer, and many people were drunk, including a 15 year old girl. (T June 18, 194). Deputy Michael McCabe also testified to the drunkenness of the partygoers. (T June 18, 229).

Dr. Ljubisa Dragovic did the autopsy of Stanley Underwood on May 19, 1990. He was 6' tall, 214 pounds with an athletic body, and about 22 years old. His blood alcohol level was .22. He had no illegal drugs in his system. (T June 11, 61, 76, 80). He was killed by a stab wound to the chest. (T June 11, 61-71). Respondent's knife (exhibit 2) was consistent with the wounds. (T June 11, 72). All the wounds were made quickly, in a period of a few seconds. (T June 11, 80).

REASONS FOR DENYING THE WRIT

1. **This is an interlocutory appeal. The issue could become moot before decision.** This is an interlocutory appeal by the Petitioner

warden. The more common practice is for the United States Supreme Court to grant review in cases where there has been a final judgment below.

We still have not had the Sixth Circuit panel ruling on the merits of the Habeas Corpus appeal, to be argued April 21, 2004. If that ruling goes against Respondent Abela, then the Respondent's claim of error will be moot. In other words, if Respondent Abela loses his Sixth Circuit appeal, Petitioner Caruso will win regardless of the outcome of this Petition for Writ of Certiorari, which would make the outcome of this Petition for Writ of Certiorari irrelevant to the outcome of the case.

If the panel ruling goes against Respondent Abela, and this Court grants certiorari to Petitioner Caruso, Respondent Abela will seek review of all the rulings in the case that go against him. It would be appropriate to delay any decision on Petitioner's petition until after the Sixth Circuit panel ruling so that the entire case can be considered together.

2. **Petitioner has waived the issue of timeliness by not appealing the United States District Court ruling finding that Respondent Abela's Petition for Habeas Corpus was timely filed.** In *Searcy v. Carter*, 246 F.3d 515 (6th Cir. 2001), the Court stated:

> "As we have repeatedly recognized, when AEDPA applies, "a court of appeals will address only the issues which are specified in the certificate of appealability." See, e.g., *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1074

(6th Cir. 1997), overruled in part by *Lindh v. Murphy*, 521 U.S. 320 (1997)."

In accord, see *Hunt v. Mitchell*, 261 F.3d 575 (6th Cir. 2001). Respondent Abela, as Habeas Corpus petitioner, did not raise in his Motion to Issue Certificate of Appealability any claim regarding timeliness. The issue cannot be heard at the behest of the Respondent.

The issue also cannot be heard at the behest of the Petitioner warden, because the Petitioner chose not to appeal. Petitioner could have filed a Notice of Appeal, even though another party was also appealing. F.R.A.P. 3, 4. The failure to appeal amounted to a waiver of the right to complain about the District Court ruling. See *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140; 106 S.Ct. 466; 88 L.Ed.2d 435 (1985).

In *Vance v. Pilot Life Insurance Co.*, 810 F.2d 202 (6th Cir. 1986), the insurance company filed as appellant, and Vance filed an appeal as cross-appellant, but his filing was untimely. The Court held that Vance's complaints of error in the District Court proceedings could not be heard on appeal, but the insurance company's claims of error could be heard. The same ruling was made in *Chaney v. Mobley*, 791 F.2d 931 (6th Cir. 1986) [late filing as cross-appellant deprived Court of Appeals of jurisdiction to hear claims of error advanced by appellee].

See also *Davis v. Mutual Life Insurance Co.*, 6 F.3d 367 (6th Cir. 1993) [where only one appellee filed for appeal as cross-appellant, only that appellee could complain of alleged errors in the District Court ruling.]

It is improper for a Habeas Corpus court to raise defenses for the State that the State has chosen not to raise. In *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002), the District Court attempted to dismiss a case on timeliness grounds not asserted by the State in its pleadings. The Sixth Circuit ruled this was not a jurisdictional issue. The Court further ruled that the District Court lacked the authority to raise the defense on behalf of the State because the State had waived the issue by not raising it in an Answer. The same rule should apply here, where the State has waived the issue by not appealing.

An appellee has no pending challenge to the District Court ruling. An appellee cannot call upon the Court of Appeals to overturn rulings of the District Court; only an appellant can do that. The choice of the appellee not to become a cross-appellant was a waiver of the right to cross-appeal, and therefore a waiver of the right to ask the Court of Appeals, and this Court, to overturn portions of the District Court ruling.

3. **To grant Petitioner's requested relief would require this Court to overturn the ruling in *Duncan v. Walker*, 533 U.S. 167; 121 S. Ct. 2120; 150 L. Ed. 2d 251 (2001).** In non-death penalty cases, tolling

continues during "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d). In death penalty cases, tolling continues "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition." 28 U.S.C. § 2263(b)(2).

Petitioner's position is that State post-conviction or other collateral review is not "pending" after the ruling of the state Supreme Court, while the matter is on review at the United States Supreme Court. However, to follow that interpretation, this Court would have to interpret the language of 28 U.S.C. § 2244(d) as meaning exactly the same thing as the language in 28 U.S.C. § 2263(b)(2), even though Congress used different language in the two provisions.

In *Duncan v. Walker*, 533 U.S. 167; 121 S. Ct. 2120; 150 L. Ed. 2d 251 (2001), this Court held:

> "It is well settled that [w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Duncan v. Walker holds that two statutory provisions involving different language should not be interpreted the same, and that it is presumed that Congress used the differing language for a reason. Since

this ruling is only 3 years old, we presume that the Supreme Court is not ready to overturn it. Since Petitioner's interpretation of the statute requires *Duncan v. Walker* to be overruled, there is no point in granting certiorari.

4. **Petitioner has mischaracterized much of the case law cited.** This case involves a Habeas Corpus petitioner, Respondent Abela, who did go to the United States Supreme Court after losing in the Michigan Supreme Court on collateral review. Seven of the ten the cases cited by Petitioner as rejecting Respondent's position on timeliness (PWC, 8) do not involve this situation. These cases, which have been mischaracterized by Petitioner, involve a Habeas Corpus petitioner who could have, but did not, go to the United States Supreme Court.

The seven cases mischaracterized by Petitioner contain no holdings concerning what happens when a Habeas Corpus petitioner actually does go to the United States Supreme Court upon losing collateral review in the state Supreme Court: *Smaldone v. Senkowski*, 273 F.3d 133 (2d Cir. 2001); *Stokes v. District Attorney of the County of Philadelphia*, 247 F.3d 539 (3d Cir. 2001); *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999); *Gutierrez v. Schomig*, 233 F.3d 490 (7th Cir. 2000); *White v. Klitzkie*, 281 F.3d 920 (9th Cir. 2002); *Coates v. Byrd*, 211 F.3d 1225 (11th Cir. 2000); *Isham v. Randle*, 226 F.3d 691 (6th Cir. 2000).

5. **The case law of other circuits on which Petitioner relies has all been based on a false premise.** There has been a "creeping" of the case law. Original case law sets forth positions that do not affect this Respondent, that a collateral review litigant who does not go to the United States Supreme Court should not get credit as if he did go there. However, some cases take that original case law and claim that it compels a decision which was not actually made in those earlier cases.

The first case that actually does make a holding against a Habeas Corpus petitioner who did go to the United States Supreme Court upon losing collateral review in the state Supreme Court is *Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999).

The ruling in *Rhine v. Boone* states: "proceedings before the United States Supreme Court seeking review of a state habeas corpus application do not toll the one-year limitations period." In support of that proposition the Court cites 6 cases, none of which contain the holding they are cited for: *Stokes, Ott, Isham, Snow, Bunney,* and *Coates*, all supra. None of the cited cases in *Rhine v. Boone* involved a person who actually filed in the United States Supreme Court. A ruling that relies on a citation to cases for propositions that are not in their holdings is of questionable validity.

The next case to follow the rule Petitioner would follow, *Crawley v. Catoe*, 257 F.3d 395 (4th Cir. 2001), cites as its authority *Rhine v. Boone*. The

final case to follow the rule Petitioner would follow, *Miller v. Dragovich*, 311 F.3d 574 (3rd Cir. 2001) cites *Rhine v. Boone* and *Crawley v. Catoe*.

In other words, the holding in *Rhine v. Boone* is based on a false premise, that is, that the cases of *Stokes, Ott, Isham, Snow, Bunney,* and *Coates,* contain holdings that they do not, in fact, contain. All other cases following *Rhine v. Boone* are based on the authority of *Rhine v. Boone* and are equally as erroneous because all based on the same false premise.

6. **There is ample case law directly supporting the Sixth Circuit ruling.** In *Morris v. Horn*, 187 F.3d 333 (3d Cir. 1999), the Petitioner had filed in state court for collateral review, which was denied by the Pennsylvania Supreme Court in 1996. On December 1, 1996, the Petitioner filed a Petition for Writ of Certiorari with the United States Supreme Court. On June 23, 1997, the United States Supreme Court denied certiorari. The Third Circuit ruled that the statute was "tolled from April 2, 1990 until June 23, 1997." This holding is directly on point, and directly holds that the time spent by a litigant in seeking United States Supreme Court review from a denial of state court collateral review does not count against the Petitioner's year.

In *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001), the Court recognized the authority of *Morris v. Horn*. However, using an analysis similar to that used by the Sixth Circuit in *Isham v. Randle*, the Court distinguished *Morris v.*

Horn and ruled that the collateral review is not "pending" beyond the final state court ruling where no Petition for Writ of Certiorari to the United States Supreme Court is actually filed.

In *White v. Klitzkie*, 281 F.3d 920 (9th Cir. 2002), no Petition for Writ of Certiorari was filed with the United States Supreme Court, so the case, like *Nara v. Frank*, is somewhat different than at bar. However, the comments of Judge Berzon in dissent support Petitioner's position. Among the points he made were:

a) Congress could not have intended, and did not intend, a scheme whereby a Petitioner might be required to file in one court before he was finished with a preceding court.

b) State court collateral review is still "pending" until the petition filed is finally decided, and that includes United States Supreme Court review where applied for. Until the United States Supreme Court rules, the collateral review has not been "finally decided," because the United States Supreme Court has the authority to overturn the state court ruling. "The application does not thereby stop being a state habeas proceeding or turn into a federal rather than a state application; it is just not finally decided yet."

c) United States Supreme Court review of a state court ruling is not an application for federal post-conviction or collateral review, the only

authority for which is found in 28 U.S.C. § 2254. The United States Supreme Court is not performing §2254 review when considering a Petition for Writ of Certiorari from the decision of a state court.

d) The differing language between the death penalty review provisions, 28 U.S.C. § 2263(b)(2), and the review provisions for other cases, 28 U.S.C. § 2244(d)(2), demonstrates that the state court collateral review is still "pending" while under consideration by the United States Supreme Court, using the rules of statutory construction followed by the United States Supreme Court in *Duncan v. Walker*. Judge Berzon stated:

> "The language in § 2263(b)(2) concerning tolling for state habeas petitions differs from that contained in § 2244(d)(2), which omits the phrase "until the final State court disposition of such petition." As *Duncan* noted in interpreting § 2244(d)(2): "It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion." Id. at 2124 (internal quotations omitted). Congress' decision to include the language "until the final State court disposition of such petition " in § 2263(b)(2), but to omit it in § 2244(d)(2), indicates that Congress intended the tolling period to end with "the final State court disposition" in situations controlled by § 2263(b)(2), but to continue for as long as the application "is pending" in situations controlled by § 2244(d)(2)."

7. **Case law of the United States Supreme Court, involving slightly different situations, also supports the Sixth Circuit ruling.**

In *Clay v. United States*, 537 U.S. 522 (2003), a case involving a federal prisoner's motion under 28 U.S.C. § 2255, the Court held:

> "Here, the relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."

If that rule applies to a petition of a state prisoner under 28 U.S.C. § 2254, then Respondent Abela's position, as well as that of the Sixth Circuit, is obviously correct and should be left undisturbed.

In *Caspari v. Bohlen*, 510 U.S. 383; 114 S.Ct. 948; 127 L.Ed.2d 236 (1994), the Court, admittedly in a different context, defined "finality" of a state court conviction and sentence as not occurring until after the United States Supreme Court has ruled:

> "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."

See also *Lambrix v. Singletary*, 518 U.S. 518; 117 S.Ct. 1517; 137 L.Ed.2d 771 (1997), holding that there is no "finality" until the time for applying to the United States Supreme Court has expired:

> "Lambrix's conviction became final on November 24,

> 1986, when his time for filing a petition for certiorari expired."

And see also *Allen v. Hardy*, 478 U.S. 255, fn. 1; 106 S.Ct. 2878; 92 L.Ed.2d 199 (1986)(also in a slightly different context than here):

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed."

See also *Blasi v. Attorney General of Pennsylvania*, 30 F. Supp. 2d 41 (M.D. Pa. 1998); *Deerwester v. Carter*, 26 F. Supp. 2d 2080 (C.D. Ill. 1998); *Torres v. Irvin*, 33 F. Supp. 2d 257 (S.D.N.Y. 1998); *Souch v. Harkins*, 21 F. Supp 2d 1023 (D. Ariz. 1998); *Moore v. Hawley*, 7 F. Supp. 2d 901 (E.D. Mich. 1998).

Petitioner Caruso has not cited any United States Supreme Court holdings to the contrary. Accordingly, the state court collateral review was not completed until the United States Supreme Court denied certiorari, in this case where a Petition for Writ of Certiorari was actually and timely filed.

8. **Applying rules of statutory construction to this case.**

Under *Duncan v. Walker*, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and

purposely in the disparate inclusion or exclusion." Where Congress in death penalty cases ends the tolling with "the final State court disposition of such petition," but in non-death penalty cases continues the tolling while review is "pending," *Duncan v. Walker* commands that the reviewing court presume that Congress used that differing language for a reason. Therefore, a statutory interpretation that treats the two provisions as being exactly the same (that tolling ends with the final State court disposition of the collateral review) is presumed to be incorrect.

The question to be addressed in non-death penalty cases is when is a matter still "pending?" Black's Law Dictionary, 6th ed. p. 1134 (1990) defines "pending" as:

> "Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment."

We submit that a matter is "pending" as long as a court has before it a "properly filed" pleading, see *Artuz v. Bennett*, 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.E.2d 213 (2000), that could result in the ruling in a case being overturned. Because the Petition for Writ of Certiorari filed by Petitioner Abela in the United States Supreme Court could have resulted in an order reversing the state court denial of collateral review, the state court collateral review was still "pending" until the United States Supreme Court

disposed of his Petition. A matter is "pending" where it is still subject to reversal.

Accordingly, the ruling in *Duncan v. Walker* is readily explained. State court collateral review is not "pending" while a Petition for Habeas Corpus is pending in United States District Court, because the State court collateral review is over. The United States District Court in that case has before it a civil case.

In contrast, when one applies to the United States Supreme Court after losing collateral review in the highest court of the state, the matter filed in state court is still "pending," because the United States Supreme Court has the authority in that case to actually reverse the state court ruling.

This conclusion is further bolstered by the language of 28 U.S.C. § 2244(d)(1)(A), holding that the limitation period for filing federal Habeas Corpus begins at the earliest of certain options, including "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Under that provision, Congress recognizes that the state court conviction is not "final" until the United States Supreme Court has had its say, or the time to apply for that has expired. See *Bronaugh v. State*, 235 F.3d 280 (6th Cir. 2000). This recognizes the principle that a state court ruling is not final, and therefore

is still "pending," until United States Supreme Court review is completed. That principle is not compromised in any way by the differing treatment of the "could have filed" situation discussed in certain cases. Congress could legitimately provide that a matter is pending while actual United States Supreme Court review is ongoing, while at the same time provide that the uneffectuated right to seek United States Supreme Court review has tolling effect only under certain circumstances.

The District Court and Sixth Circuit en banc position on tolling makes sense. We submit that Congress intended for the state court prisoner to complete the collateral review proceedings before going forward in federal court with a Petition for Habeas Corpus, and not to require that the state prisoner file a Petition for Habeas Corpus before the collateral review process has been completed.

A clear example may help illustrate this principle. Suppose that a Petitioner, Mr. X, files state court collateral review within 1 week of losing in the state Supreme Court on his first appeal. After losing in the state Supreme Court again, he files a Petition for Writ of Certiorari with the United States Supreme Court within 1 week. The United States Supreme Court then takes more than a year to decide the Petition for Writ of Certiorari, ultimately denying it. Under the panel's ruling Petitioner would be barred from proceeding in Habeas Corpus at all, even though, under

Petitioner's position, only 2 weeks of the year had elapsed.

Why should the amount of time that a reviewing court spends considering a case determine whether a Petitioner can seek further review in other courts? Taking the example above, it is absurd to say that Mr. X can file a Petition for Habeas Corpus provided that the United States Supreme Court takes only 10 or 11 months to decide a Petition for Writ of Certiorari, but that he is barred if the United States Supreme Court takes a full year.

There is no indication in the AEDPA that Congress intended to make petitioners choose between a Petition for Writ of Certiorari to the United States Supreme Court and a Petition for Habeas Corpus to the United States District Court. We submit that Congress did not intend that by filing a Petition for Writ of Certiorari one would thereby lose the right to file a Petition for Habeas Corpus. We submit that while the United States Supreme Court review is pending, the time for filing in the District Court is tolled. Review in the United States Supreme Court of state court collateral review means that review is still "pending" under 28 U.S.C. § 2244(d)(2) and therefore seeking such review tolls the time for filing under that statute.

It is premature to file a Petition for Habeas Corpus before it is known whether the state Supreme Court will correct the constitutional violations.

After the state Supreme Court denies leave to appeal, to proceed with timely review in the United States Supreme Court would not be the failure to proceed with diligence to which the AEDPA is directed. It is just as premature to file a Petition for Habeas Corpus before it is known whether the constitutional violations will be addressed by the United States Supreme Court on a Petition for Writ of Certiorari, in those cases where a Petition for Writ of Certiorari is filed.

We therefore submit that seeking United States Supreme Court review is legitimate action that keeps other collateral review "pending" and does not eat up and eliminate the time for filing a Petition for Habeas Corpus.

In *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997), the Court examined unclear statutory language and determined that District Courts can issue Certificates of Appealability. The Court stated:

> "Because Congress may have intended that prisoners still have the choice of asking the district court to issue a certificate of appealability, a court should hesitate to take that right away from them. This lends some support to our conclusion that the AEDPA allows district courts to issue certificates of appealability."

Because Congress apparently did intend that prisoners still have the choice of seeking United States Supreme Court review in collateral review cases, a court should hesitate to take that right away from them, or to make the right subject to losing the right to file in Habeas Corpus.

The Petitioner's position would not lead to an endless, indefinite suspension of time limits in Habeas Corpus cases, as caused the Court to reject the Petitioner's position in *Searcy v. Carter*. The time to file in the United States Supreme Court is limited to 90 days, and the only further tolling would be during the time that the United States Supreme Court considers the Petition. This involves a discrete, easily measured time period that would not eviscerate the Habeas Corpus time limits as in *Searcy*, but would instead be in full compliance with them.

The fact that there are provisions for tolling at all demonstrates that Congress intended for the state prisoner to file in only one court at a time. Congress intended for the state court prisoner to complete the collateral review proceedings before going forward with Habeas Corpus, and not to require that the state prisoner file in the United States District Court while proceedings in other courts are still pending. This is so even though seeking United States Supreme Court review is an optional step.

As the Court stated in *Duncan v. Walker*, the statutes should be interpreted so as not to "increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." To force the hypothetical Petitioner X to file in United States District Court while the matter is pending in the United States Supreme Court would create piecemeal litigation, which the United States Supreme Court says was not

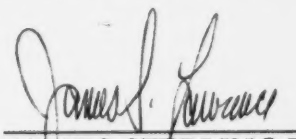
the intent of Congress.

The District Court was therefore correct in ruling that "the limitations period was tolled from May 28, 1998, when the Michigan Supreme Court denied leave to appeal, until October 19, 1998, when the United States Supreme Court denied certiorari." The Circuit Court ruling upholding that was correct and should not be disturbed.

CONCLUSION

Respondent Kevin Abela, the Habeas Corpus petitioner, respectfully submits that for the reasons stated above, this Court should deny the Petition for Writ of Certiorari. If the Petition for Writ of Certiorari is granted, it should be granted as to all the issues in the case, including any issues on which Respondent Abela may lose in the Sixth Circuit Court of Appeals upon full review of the merits by the panel.

Respectfully submitted,



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Dated: April 19, 2004

No. 03-

IN THE SUPREME COURT OF THE UNITED STATES

PATRICIA L. CARUSO,
Director, Michigan Department of Corrections,

Petitioner

vs.

KEVIN MARK ABELA,

Respondent.

LIMITED APPEARANCE OF COUNSEL

James Sterling Lawrence, attorney at law, hereby enters his limited appearance as counsel for Respondent Kevin Abela, limited to filing this Answer to the Petition for Writ of Certiorari. Although counsel has not been retained, he is filing the Answer in response to the request of the United States Supreme Court. Counsel is a member of the Bar of the United States Supreme Court.

Respectfully submitted,

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Dated: 4-19-04

No. 03-

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PATRICIA L. CARUSO,
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CERTIFICATE OF SERVICE

James Sterling Lawrence, attorney at law, hereby certifies that on this date he mailed 2 copies of the Motion to Proceed in Forma Pauperis, Respondent's Answer to Petition for Writ of Certiorari, Limited Appearance of Counsel, and Certificate of Service to:

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Respectfully submitted,

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